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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No. 1160

ZEREFA MALOOF,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Zerefa Maloof, for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, respectfully shows:

STATEMENT OF THE CASE AND OF THE MATTER INVOLVED.

Petitioner was informed against, tried, convicted and sentenced for renting a room in a rooming-house

for a price claimed to be greater than that fixed by law.

The information, omitting the caption, is as follows (R. 2):

"INFORMATION.

(Emergency Price Control Act of 1942, as amended; Title 50 U.S.C.A. App., sections 902, 904(a) and 925(b).)

Leave of Court being first had, Frank J. Hennessy, United States Attorney for the Northern District of California, comes, and for the United States of America, informs this Court: THAT

ZEREFA MALOOF,

(hereinafter called 'said defendant') on or about the 15th day of December, 1945, in the City and County of San Francisco, State of California, in the Southern Division of the Northern District of California and within the jurisdiction of this Court, did unlawfully, wilfully and knowingly rent to B. E. Wood and R. D. Sullivan a certain room in a hotel and rooming house, to-wit, Room No. 11, Hotel Rosslyn, 44 Eddy Street, City and County of San Francisco, State of California, for a rental price of $5.00 per night for two persons, which said sum of $5.00 per night for two persons was higher than the maximum price fixed by law, said maximum price then and there being $2.00 per night for two persons, as the said defendant then and there well knew. (Regulations for Hotels and Rooming Houses, 9 F. R. 11322.)"

The petitioner pleaded not guilty to the charge and thereafter, on January 15, 1946, the cause came on

regularly for trial before the District Court, sitting without a jury. After the taking of testimony, the Court found petitioner guilty and she was sentenced to serve sixty days in the County Jail and pay a fine of $300.00.

From the foregoing judgment and sentence petitioner appealed to respondent Court on the ground that the District Court was without jurisdiction of the cause for the reason that the information did not state facts sufficient to constitute an offense.

The grounds advanced as to the insufficiency of the information were: (1) That the Emergency Price Control Act only applied to a particular class of persons, viz: people operating rooming houses or legally empowered to rent rooms, and the information did not allege that petitioner was one of such class, and (2) That neither law nor regulation fixed the price at which the room could lawfully be rented; that the Regulations for Hotels and Rooming Houses promulgated by the Price Administrator merely provided several formulae by which such maximum rental could be ascertained and fixed, depending upon existing and variable facts and circumstances, that such facts and circumstances had to be set forth in the information so that the Court could determine whether a crime had been committed; that the function of an accusatory criminal pleading was, among other things, to place the Court in such position that, by comparing the facts alleged with the statutes or regulations of which the Court could take judicial notice, it could ascertain whether the information charged a crime.

The respondent Circuit Court of Appeals decided both contentions against petitioner. (R. 14.)

A petition for rehearing was granted. (R. 18.) Respondent Court rendered a second decision adopting and affirming its first decision. (R. 20.)

A second petition for rehearing was denied. (R. 22.)

The decision of the lower court held that the Emergency Price Control Act was not limited to a particular class of persons, but applied to any person who demanded or received any rent in excess of the maximum established by the Administrator of the Act. (R. 16.)

The Price Administrator, acting under the provisions of the Emergency Price Control Act, adopted "Regulations for Hotels and Rooming Houses" (9 Fed. Register 11322) and in Section 4 thereof prescribed four different methods for computing maximum rents. Each of the first three of these formulae provided a method of computing the rent, based on pre-existing facts and circumstances, entirely different from any of the others and the fourth method allowed the administrator, in the event a maximum rent was not reached under the first three methods, to make an order fixing the maximum rent.

The foregoing sections of the regulations, pertinent to the question raised are set forth in full in the brief appended hereto.

Section 4 of the Regulations does not fix or prescribe any maximum rent for any room but merely provides various formulae, based upon varying condi-

tions and circumstances, for computing such rent, the amount of rent computed varying with the formula used. Petitioner contended that the information alleging $2.00 per night for two persons to be the maximum rent established by law and regulation was the mere conclusion of the pleader, that while the Court could take judicial knowledge of the regulations an inspection thereof gave no information to the Court as to what the maximum rent was and that under such circumstances the information was insufficient; that the information should have set up the circumstances and facts which brought it within either one or the other of the four subdivisions of Section 4 of the Regulations.

The Appellate Court held the information to be sufficient on the ground that under section 11 of the Regulations persons operating rooming houses nad to file a schedule showing the maximum rent to be charged for any room (R. 16), and once the maximum rent had been so filed it could not be changed except by an order made under section 5 of the Regulations (R. 17) and "that thus the maximum rent was definite and certain." **By so holding the Circuit Court of Appeals rendered the information definite and certain by taking cognizance of and reading into it a matter of which the Court could not take judicial knowledge.**

The lower court in effect further held that an accusatory criminal pleading was sufficient if it merely advised the accused of the facts alleged to constitute a crime, even though a Court could not determine, by a

reading of the information, whether a crime had in fact been committed.

It is to correct the foregoing erroneous rulings of the Appellate Court that relief herein is sought by way of certiorari.

JURISDICTIONAL STATEMENT.

1. Jurisdiction of the Court.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended. (28 U.S.C.A. sec. 347.)

2. The decisions and judgments of the Circuit Court of Appeals.

The original decision of the Circuit Court of Appeals was rendered and filed on August 29, 1946. (R. 14.) 156 F.(2d) 977.

A petition for rehearing was granted on October 11, 1946. (R. 18.)

The second decision of the appellate court was rendered and filed on January 20, 1947.

The second petition for rehearing was denied on February 26, 1947. (R. 22.)

The judgment of the appellate court was entered on January 20, 1947. (R. 21.)

3. The basis upon which it is contended the Supreme Court has jurisdiction and cases in support thereof.

(1) The sole contention herein is that the Information filed against petitioner fails to state any offense against the United States and that as result thereof the District Court never acquired jurisdiction. This Court has held that a Federal Court can only acquire jurisdiction by the filing of a sufficient charge of crime in such Court in *Albrecht v. United States,* 273 U. S. 1, 71 L. ed. 505; *Pettibone v. United States,* 148 U. S. 197, 37 L. ed. 419; and *United States v. Hess,* 124 U. S. 486, 31 L. ed. 516, in each of which cases this Court exercised its jurisdiction to consider the sufficiency of the accusatory pleading.

(2) The lower Court has misconstrued the Emergency Price Control Act in holding that it is not limited to a particular class of persons.

Where the lower Court has misconstrued an act of Congress this Court has jurisdiction to correct such error on certiorari. *Federal Trade Com. v. Raladam Co.,* 316 U. S. 149, 150; 86 L. ed. 1136, 1339.

THE QUESTIONS PRESENTED.

1. Does the Emergency Price Control Act (50 U.S. C.A. App. Sec. 902, et seq.) in providing for the fixing of maximum rents for rooms in rooming houses, only apply to a particular class of persons, to-wit: one who is the owner or in charge or control of rooming house or acting as such person's agent?

2. Where one is charged with a criminal violation of the Regulation fixing rents under the Emergency Price Control Act, must not the accusatory pleading state directly that such person is of the class of persons regulated by the Act?

3. Must not an indictment or information contain such recital of facts that, by comparing such facts with the statutes and regulations of which it can take judicial knowledge, the Court can determine whether a crime has been committed?

4. Where neither law nor regulation of which the Court can take judicial knowledge fixes the maximum price at which a room can be rented or an article sold, but a regulation merely sets forth various formulae for computing such maximum price, one being applicable under one set of circumstances and another under other circumstances, must not an accusatory pleading charging a rental in excess of a maximum established by law descend to particulars and plead the facts by which is established such maximum rental.

POINTS RELIED ON FOR THE ISSUANCE OF THE WRIT OF CERTIORARI.

The lower court has laid down dangerous and erroneous rulings as to the sufficiency of indictments and informations, which rulings are contrary to comparable decisions rendered by this Court and other Circuit Courts of Appeal, as appears from the following:

1. The lower court holds that an essential allegation in an accusatory pleading may be established by inference and intendment. Such ruling is directly contrary to the decisions of this Court in *United States v. Hess,* supra; *Pettibone v. United States,* supra, and *Albrecht v. United States,* supra; and is in conflict with appellate decisions from other circuits such as: *Asgill v. United States,* 60 F.(2d) 780 and *Harris v. United States,* 104 Fed. (2d) 4.

2. The lower court erroneously holds that a trial court, in determining the sufficiency of an information, may consider matters not pleaded and of which it cannot take judicial knowledge.

3. The opinion of the lower court erroneously holds that an information is valid and sufficient if it conveys to the accused information as to what he is to be tried for, even though the Court cannot determine therefrom whether, assuming the pleaded facts to be true, a crime has in fact been committed, all contrary to the decisions of this Court in the cases cited above and the case of *United States v. Cruikshank,* 92 U. S. 542, 23 L.Ed. 588.

4. The lower court has erroneously held that a material allegation necessary to a valid information may be supplied by a Bill of Particulars, contrary to the general rule and the decisions of the same Court such as *Foster v. United States,* 253 Fed. 481.

5. The opinion of the lower court erroneously holds that, where a regulation of an administrator of an Act of Congress has filed and published in the Federal

Register a regulation setting forth various and variable formulae for the ascertainment of a particular fact beyond which a person cannot go with inviting criminal penalties, an accusatory pleading is sufficient if it merely states the pleader's conclusion as to what is such fact without setting forth either the facts calling into effect one of the formulae or the formula used. This is an important question of general law decided in a way not tenable and in conflict with the weight of authority.

6. The lower court has misconstrued the purport and provisions of the Emergency Price Control Act.

IMPORTANCE OF THE QUESTIONS INVOLVED.

The questions involved are of importance, as was recognized by the Circuit Court of Appeals when it granted a rehearing, and transcends the particular offense before the Court or the punishment meted out to petitioner.

With the multitude of governmental agencies administering various Acts of Congress and promulgating hundreds upon hundreds of Regulations, some definite and certain while others are uncertain in merely providing rules, standards and formulae by which ultimate facts are to be determined, it becomes important for this Court to declare whether or not prosecutions based upon such Regulations can be conducted on accusatory pleadings merely stating the conclusion of a pleader, and whether in determining

the sufficiency of the facts alleged in such pleading, the Court is confined to the statutes and Regulations of which it can take judicial knowledge or is at liberty to indulge in surmise or conjecture as to whether the conclusion alleged in the pleading is the correct answer to the working out of some formula prescribed by an administrative agent.

Wherefore, petitioner respectfully prays that this Honorable Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to the end that the questions involved may be fully presented and justice done in the premises.

Dated, San Francisco, California,
March 24, 1947.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am counsel for the petitioner in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
March 24, 1947.

LEO R. FRIEDMAN,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No.

ZEREFA MALOOF,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED AND CASES BELIEVED TO SUSTAIN THE JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of section 240(a) of the Judicial Code. (28 U.S.C.A. sec. 347.) (See, also, Rule 37(b) of the Federal Rules of Criminal Procedure for District Courts.)

The grounds on which the jurisdiction of this Court is invoked and the cases believed to sustain the jurisdiction have been fully set forth under a similar head-

ing in the petition and again under the heading "Points relied upon for issuance of the writ of certiorari". To avoid unnecessary repetition they will not be repeated here.

THE OPINIONS AND JUDGMENTS OF THE COURT BELOW.

The judgment of the trial Court was entered on January 21, 1946. (R. 3.)

The first opinion of the Circuit Court of Appeals was rendered and filed on August 29, 1946. (R. 14.) 156 F. (2d) 977.

A petition for rehearing was granted on September 26, 1946. (R. 18.)

The second opinion and decision of the Circuit Court of Appeals was filed January 20, 1947. (R. 20.)

The second petition for a rehearing was denied on February 26, 1947. (R. 22.)

The judgment of the Appellate Court was entered on January 20, 1947. (R. 21.)

STATEMENT OF THE CASE.

A full and complete statement of the case, the questions presented and the importance thereof, have been set forth in the petition for the allowance of the writ, reference to which is hereby made and a repetition thereof omitted in order not to prolong the length of this brief.

A summary of these matters is as follows:

Petitioner was informed against (R. 2), and charged with having rented "a certain room in a hotel and rooming house * * * for a rental of $5.00 per night for two persons which said sum of $5.00 per night for two persons was higher than the maximum price fixed by law, said maximum price then and there being $2.00 per night for two persons as the said defendant then and there well knew (Regulations for Hotels and Rooming Houses, D. R. 1132)."

After trial and conviction petitioner appealed to the lower Court on the ground that the information was insufficient and contained only conclusions of law on the grounds:

(a) That the information was lodged under the Emergency Price Control Act (50 U.S.C.A., App. sec. 902, et seq.), which by its terms only regulated a particular class of persons and that the information failed to allege petitioner to be one of such class;

(b) That neither law nor regulations in fact fixed the price at which the room could be lawfully rented as the regulations adopted by the administrator merely provided several formulae, based upon varying pre-existing facts and conditions, for the fixing of such maximum rent, the result of applying any one formula differing from the result reached by using any other thereof; that under such circumstances the information had to descend to particulars and set forth such pre-existing facts and circumstances and the formula by which the maximum rent could be determined;

(c) That before an accusatory pleading is sufficient to confer jurisdiction on the Court it must state facts so that the Court, by comparing the facts alleged with the statutes and regulations of which the Court could take judicial notice, can ascertain whether a crime has in fact been committed.

The Circuit Court of Appeals decided each of these contentions against petitioner in its original decision. (R. 14.)

A petition for rehearing was filed and, the Appellate Court considering the questions to be of grave importance, granted the same. (R. 18.) After the reargument and submission of the cause the lower Court rendered a second decision reaffirming the first one rendered (R. 20) and thereafter denied a second petition for a rehearing. (R. 22.)

SPECIFICATION OF THE ASSIGNED ERRORS RELIED ON.

1. The Circuit Court of Appeals erred in holding the information to be sufficient as stating an offense against the United States and conferring jurisdiction on the District Court.

2. The Circuit Court of Appeals erred in holding that the Emergency Price Control Act was not limited to a particular class of persons but applied to any person renting a room, whether or not such person had the right, power or authority so to do.

3. The Circuit Court of Appeals erred in holding, under the circumstances narrated above and hereafter

argued, that the information was sufficient in merely alleging the conclusion that $5.00 per night for two persons was the maximum rental established by law and regulation for the rental of the room in question, without setting forth the facts showing how the amount pleaded was arrived at.

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1. GENERAL PRINCIPLES OF LAW RELATING TO INDICTMENTS AND INFORMATIONS.

Neither the testimony or other portions of the record can be resorted to for the purpose of supplying a necessary allegation missing from the charge.

Fontana v. United States, 262 Fed. 283.

A Federal Criminal Court can only acquire jurisdiction by the filing of a sufficient charge of crime in such Court.

Albrecht v. United States, 273 U.S. 1, 8, 71 L. ed. 505, 509.

A material fact cannot be supplied by way of recital, or by inference, intendment, or implication:

"The fact must be charged and charged distinctly. We cannot by inference fill out an incomplete charge."

United States v. Morrissey, 32 Fed. 147, 151;
Danaher v. United States, 39 F. (2d) 325.

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be

supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital."

United States v. Hess, 124 U.S. 483, 486, 31 L. ed. 516;

Pettibone v. United States, 148 U.S. 197, 202, 37 L. ed. 419, 423;

Asgill v. United States, 60 Fed. (2d) 780;

Harris v. United States, 104 F. (2d) 4.

The purpose of an indictment or information, among other things, is to inform the Court of facts from which the Court can determine whether a crime has been committed:

"The object of the indictment is, * * * second, to inform the court of the facts alleged, so it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone."

United States v. Cruikshank, 92 U.S. 542, 23 L. ed. 588, 593;

United States v. Hess, 124 U.S. 483, 487, 31 L. ed. 516, 518.

Where the law, under which an accused is prosecuted, is enacted in general terms, or generally provides that under varying circumstances different acts may constitute a violation thereof, an indictment or information is not sufficient if merely worded in the language of the law. The particulars must be stated:

"In criminal cases, prosecuted under the laws of the United States, the accused has the consti-

> tutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In U.S. v. Mills, 7 Pet., 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in U. S. v. Cook, 17 Wall. 174 (84 U.S. XXI, 539), that 'Every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.' "
>
> *United States v. Cruikshank,* supra;
> *Asgill v. United States,* 60 F. (2d) 780, 784.

Early in our judicial history Chief Justice Marshall stated the reason why an accusatory pleading must state facts showing the commission of a crime in *The Schooner Hoppet v. United States,* 7 Cranch 389, 3 Law. Ed. 380. The Chief Justice's language in this regard is as follows:

> "That the court may see with judicial eyes that the fact, alleged to have been committed, is an offense against the laws, and may also discern the punishment annexed by law to the specific offense."

In speaking on the fact that the accusation makes reference to a law, the Chief Justice said:

"It is not controverted that in all proceedings in courts of common law, either against the person or the thing for penalties or forfeitures, the allegation that the act charged was committed in violation of law, or of the provisions of a particular statute will not justify condemnation, unless, independent of this allegation, a case be stated which shows that the law has been violated. The reference to the statute may direct the attention of the court, and of the accused, to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offense. The importance of this principle to a fair administration of justice, to that certainty introduced and demanded by the free genius of our institutions in all prosecutions for offenses against the laws, is too apparent to require elucidation, and the principle itself is too familiar not to suggest itself to every gentleman of the profession."

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2. **THE INFORMATION WAS INSUFFICIENT TO STATE A CRIME OR TO CONFER JURISDICTION ON THE DISTRICT COURT, IN FAILING TO ALLEGE THAT DEFENDANT WAS OF THE CLASS OF PERSONS GOVERNED BY THE EMERGENCY PRICE CONTROL ACT AND BY THE REGULATION.**

The prosecution was brought for a violation of a Regulation fixing maximum rentals enacted by the Price Administrator under the provisions of the Emergency Price Control Act. (50 U.S.C.A., App. sec. 902, et seq.) A reading of this Act discloses that it applies to a particular class of persons.

Section 4 of the Act (50 U.S.C.A., App. sec. 904) vests in the administrator the power to issue a Regulation setting forth the necessity for the stablization of rents in a defense-rental area and that he may, by regulation or order, establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable.

The prohibitory provisions of the Act read as follows:

> "Sec. 4 (a). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, **or to demand or receive any rent for any defense-area housing accommodations**, or otherwise to do or omit to do any act, in violation of any regulation or order under §2, or of any price schedule effective in accordance with the provisions of § 206, or of any regulation, order, or requirement under § 202(b) or § 205(f), or to offer, solicit, attempt, or agree to do any of the foregoing.
>
> (b) It shall be unlawful for any person to remove or attempt to remove from any defense-area housing accommodations the tenant or occupant thereof or to refuse to renew the lease or agreement for the use of such accommodations, because such tenant or occupant has taken, or proposes to take, action authorized or required by this Act or any regulation, order, or requirement thereunder.

(c) It shall be unlawful for any officer or employee of the Government, or for any adviser or consultant to the Administrator in his official capacity, to disclose, otherwise than in the course of official duty, any information obtained under this Act, or to use any such information, for personal benefit.

(d) Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."

It should be manifest from the foregoing provisions of the Act that it covers the actual rental of a housing accommodation or attempt, offer or agreement to actually rent a housing accommodation. The prohibitions deal with the making of leases and agreements, the eviction of tenants and expressly provides that the Act shall not require any person to rent or to offer to rent any such accommodations. **These provisions can only mean the control of the activities of people who are landlords or operators of housing accommodations or are so employed or connected therewith that they have the right to rent and control such accommodations.**

This is made more definite and certain when we turn to the Regulation promulgated by the administrator. Thus, in section 13(a)(5) (9 Fed. Reg. 11322) it is provided:

" 'Landlord' includes an owner, lessor, sublessor, assignee, or other person **receiving or entitled to receive rent for the use or occupancy of any room or an agent of any of the foregoing.**"

Section 2 of the Regulations provides in part that "no person shall demand or receive any rent for or in connection with the use or occupancy * * * of any room in a rooming house" higher than the maximum rent therein provided.

Thus, we find that both the Act and the Regulations apply only to those actually having the power, authority and ability to control the housing accommodations to the extent of renting the same or part thereof.

The information in the instant case fails to allege that petitioner was one of the persons falling within the class covered by the Act and Regulations.

Where a crime can only be committed by a particular class, the information must show on its face that the defendant belonged to that class by direct averment, and such fact cannot be supplied by inference or intendment. Many decisions pronounce this rule, but we need go no further than to a prior decision of the lower appellate court.

In *Johnson v. United States* (CCA-9), 294 Fed. 753, the indictment was a far better pleading than the information in the case at bar because it alleged, in general terms, that the defendant was a person belonging to the class involved, while here there is not even a general averment that defendant was of the class covered by the Regulation. Nevertheless, the Court reversed the judgment and at page 755 stated:

> "* * * Again, the averment that the plaintiff in error was a person required to register is a naked

conclusion of law at best. If he did certain things, or engaged in certain activities, he was required to register as a matter of law; and, if he did none of these things, he was not. As we have already seen, the court below was of the opinion that no person can possess narcotics lawfully without registration, and it would be going a long way indeed to presume that the grand jury did not fall into the same error. The question of the sufficiency of a similar indictment was reversed by this court in Bacigalupi v. U. S. (C.C.A.) 274 Fed. 367. In Pendleton v. U. S., supra, it was held that a like indictment was defective. A contrary ruling seems to have been made without discussion in Miller v. U. S. (C.C.A.) 288 Fed. 816. **But it would seem upon principle, as well as upon authority, that where a crime can only be committed by a particular class of persons, the indictment should show upon its face that the defendant belonged to that class, by direct averment, not as a mere conclusion of law;** for example, it would not be sufficient, in an indictment for illegal voting, to charge that the defendant was not a qualified voter, without setting forth the grounds of disqualification. Quinn v. State, 35 Ind. 485, 9 Am. Rep. 754. So in a prosecution for failure to register under the Selective Service Act (Comp. St. §§2044a-2044k) we apprehend it would not be sufficient to charge that the defendant was required to register. The indictment or information should go further, and show that he was one of the particular class mentioned in the statute."*

* All emphasis appearing in quotations from cases have been supplied by the writer.

In *U. S. v. McCormick,* 28 Fed. Cases 1060, 1062, Cas. No. 15,663, it is said:

> "It has been correctly contended on the part of the traverser, where an act is by statute forbidden to be done by persons of a certain description, an indictment, grounded on such statute, must by a substantive averment, bring the traverser within that description * * *. It was necessary therefore that the indictment should state by a direct allegation that the traverser was such a minister at the time when the offense is charged to have been committed."

See also, 42 *C. J. S.,* p. 1019, and cases cited in note 91.

In the instant case the information fails to allege that defendant was of the class governed by either the statute or regulation. It may be argued, as the information charges that defendant rented the room in question, that from this the inference can be drawn that she was so connected with the hotel that she had the power of renting rooms and collecting rent therefor. However, **a material fact cannot be supplied by either inference, intendment or implication.** Such fact must be directly charged and alleged.

The first decision of the lower court held the information to be sufficient on the ground (R. 16) that the Act covered any person whether or not falling within the designated class. Thus, one who obtained money by false pretenses on the representation that he was renting a room could be prosecuted under the Act. The lower court's conclusion is arrived at by only quoting a few words from Section 4 of the Act (which

we have set forth in full above), and by referring to Section 2 of the Regulations which uses the words "no person," the decision using and emphasizing "no person" and giving no consideration to the words "in connection with the use or occupancy * * * of any rooming house within the defense rental area."

The action and conclusion of the lower court is erroneous.

The mere fact that a misdemeanor is being prosecuted does not let down the bars prescribed by the rules of criminal pleading. One charged with a misdemeanor is as entitled to the same definite and certain charge of crime as one accused of the most serious offense. There is no presumption that because one is charged with renting a place that such person owned or operated or controlled the premises or had the power of rental and, as pointed out in the cases above cited, this fact cannot be supplied by either inference or intendment.

---

3. **THE INFORMATION FAILS TO ALLEGE AS A FACT WHAT WAS THE MAXIMUM PRICE FIXED BY LAW FOR THE RENTAL OF THE ROOM.**

The information charges that defendant rented the room in question for $5.00 "which said sum of $5.00 per night for two persons was higher than the maximum price fixed by law, said maximum price then and there being $2.00 per night for two persons." (R. 2.) Here follows a parenthetical reference to the OPA

regulation governing rents for hotel and rooming houses as printed in 9 Federal Register 11322.

The naked allegation that the sum was higher than the maximum price fixed by law is a mere conclusion of the pleader. Any allegation which does no more than state that an act was in violation of law or contrary to law or in excess of a limit fixed by law, is not an allegation of fact but the statement of a legal conclusion.

United States v. Minnec, 104 Fed. (2d) 575;
Middlebrooks v. United States, 23 Fed. (2d) 244;
Broadus v. United States, 30 Fed. (2d) 394;
United States v. Horton, 282 Fed. 731.

Before an information charging one with violating the maximum price regulation for the rental of rooms can be sufficient it must be alleged as a fact—not as a mere conclusion—what was the maximum price fixed by law for such rental, and this must be done by setting forth such facts as are necessary to establish such maximum price. The mere allegation that the sum of $2.00 was the maximum price is but the conclusion of the pleader.

The parenthetic reference to the Regulation For Hotels and Rooming Houses does not supply the foregoing deficiency. As stated above the purpose of the accusatory pleading is to enable the Court to determine whether or not a crime has been committed (*United States v. Cruikshank,* supra; *United States v. Hess,* supra), and in doing so the Court can take judicial knowledge of such regulations as are pub-

lished in the Federal Register, but **if the regulation itself conveys no information to the Court, the Court is powerless to make such determination and in such circumstances the information is insufficient and void.**

The regulation referred to in the information contains nothing from which the Court could ascertain the maximum rental that lawfully could be charged for room 11 in the Hotel Rosslyn.

We concede that, if a law fixed the definite and certain maximum rental, the information would be valid, as the Court could take judicial knowledge of such statute.

We also concede that, if the Regulation (filed and published in the Federal Register) definitely fixed the maximum rental, the information would be valid, as the Court could take judicial knowledge of such Regulation.

Here, however, we have neither law nor Regulation definitely or otherwise fixing such maximum rental. We only have a regulation setting up various and variable formulae for computing the maximum rent, each formula being dependent on variable pre-existing facts and the maximum rental differing in amount with each formula used. Section 4 of "Regulations for Hotels and Rooming Houses" (9 Fed. Reg. 11322) reads as follows:

"SEC. 4. *Maximum rents.* This section establishes separate maximum rents for different terms of occupancy (daily, weekly or monthly), and numbers of occupants of a particular room. Maximum rents for

rooms in a hotel or rooming house (unless and until changed by the Administrator as provided in section 5) shall be:

(a) *Rented or regularly offered during maximum rent period.* For a room rented or regularly offered for rent during the thirty days ending on the maximum rent date, the highest rent for each term or number of occupants for which the room was rented during that thirty-day period, or, if the room was not rented or was not rented for a particular term or number of occupants during that period, the rent for each term or number of occupants for which it was regularly offered during such period.

(b) *First rented or regularly offered after maximum rent period.* For a room neither rented nor regularly offered for rent during the thirty days ending on the maximum rent date, the highest rent for each term or number of occupants for which the room was rented during the thirty days commencing when it was first offered for rent after the maximum rent date; or, if the room was not rented or was not rented for a particular term or number of occupants during that period, the rent for each term or number of occupants for which it was regularly offered during such period.

(c) *First rent after maximum rent date where no maximum rent established under* (a) *or* (b). For a room rented for a particular term or number of occupants for which no maximum rent is established under paragraphs (a) or (b) of this section the first rent for the room after the maximum rent date for that

term and the number of occupants, but not more than the maximum rent for similar rooms for the same term and number of occupants in the same hotel or rooming houses.

* * * * * * *

(g) *Rent fixed by order of Administrator.* For a room for a particular term or number of occupants for which no maximum rent has been established under any other provision of this regulation, the rent fixed by order of the Administrator as provided in this paragraph (g).

The Administrator at any time on his own initiative or on petition of the landlord may enter an order fixing the maximum rent and specifying the minimum services for a room for a particular term or number of occupants for which no maximum rent has been established prior to issuance of the order under any other provision of this regulation. Such maximum rent shall be fixed on the basis of the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the maximum rent date."

No Court or judge reading the foregoing Regulation can even guess, let alone determine, what is the maximum rental for a room in any named hotel or rooming-house. Such rental depends on the existence of facts occurring at some previous time.

The parenthetic reference to the "Regulation" in the information lends no aid to anyone in determining this essential fact.

In order that a Court could take the facts alleged in the information and determine whether such facts constitute the commission of a crime (See: *United States v. Cruikshank,* 92 U. S. 542, 23 L. ed. 588, 593; *United States v. Hess,* 124 U. S. 483, 487, 31 L.ed. 516, 518; *Schooner Hoppet v. United States,* 7 Cranch 389, 3 L.ed. 380, all quoted from above), such pleading should contain allegations of fact as set forth in either subdivision (a), (b) or (c) of Section 4 of the Regulation, or the order made by the Administrator as provided in subdivision (g).

We are not without judicial authority for the foregoing contention.

In *United States v. Ferranti* (D.C.—N.J.), 59 Fed. Supp. 1003, the Court had before it an indictment charging the sale of poultry in violation of the Maximum Price Regulations. The indictment alleged that the poultry had been sold "at the price per pound of 34¢ * * * the maximum price permitted by said regulation * * * being 31¢ per pound." The language of the decision is peculiarly applicable to the case at bar. First, the District Judge stated the general rule as announced in *Fontana v. United States,* 262 Fed. 283, as follows:

> " 'It is essential to the sufficiency of an indictment that it set forth the facts which the pleader claims constitute the alleged transgression, so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for

> the same offense, **and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction.** (Citing cases.)' "

Then, in applying the rule to the indictment under consideration, the Court said:

> "Applying the principles stated in the cited cases, it is obvious that the indictment in the instant case does not fully inform the defendant of the nature and cause of the accusation made against him. To be sure the indictment alleged the prices at which it is claimed the defendant sold the poultry in question and the maximum price at which the same could have been sold lawfully, but the **allegations as to the maximum prices legally allowable are not allegations of facts but of conclusions, based upon undisclosed facts. The maximum price regulation alleged to have been violated does not establish in specific terms maximum prices for poultry; it only prescribes a formula by which such prices may be calculated, once the facts relied on for that purpose are determined. If every fact alleged in the indictment, excluding conclusions, should be admitted, it would not necessarily follow that the defendant is guilty of the crimes charged. What the maximum prices for poultry were on the dates alleged in the indictment will depend on proof of facts not disclosed by the indictment.**"

In *United States v. Johnson* (D. C.—Del.), 53 F. Supp. 167, various indictments for violating the Emergency Price Control Act were held insufficient for

merely charging that the sale, made at a certain price, was in violation of the maximum price (stated in the indictment) established by certain regulations relating to the sale of poultry, which regulations provided a formula for arriving at the maximum price.

The Court held the indictments insufficient, first, upon the general ground that an inspection of the statute, indictment and regulations did not permit either the defendants or the Court to tell what was the maximum selling price. At page 170 the District Judge states:

> "Sufficient facts of a crime committed must be stated in an indictment to support a conviction. Specifically, the court and defendants must be able to determine this from the indictment, the statutes and the pertinent administrative regulations passed pursuant to the statutes. If the facts alleged may all be true and yet appear to constitute no offense, the indictment is insufficient. Fontana v. United States, 8 Cir., 262 F. 283; Lynch v. United States, 8 Cir., 10 F. (2d) 947; United States v. Armour & Co., D.C., 48 F. Supp. 801; 27 Am. Juris. p. 621. * * * **It is impossible to glean from the allegations of each indictment, the Act, and the regulations what, in fact, the ceiling price was for the commodity, notwithstanding that the prices mentioned in the indictments are the ceiling prices or are below the ceiling prices.** Since the Act and the regulation do not establish any specific ceiling price for the commodity sub judice, defendants are entitled to know not only what the government claims the ceiling price to be, but also the manner in which it arrived at this conclusion."

Referring specifically to the indictments the District Judge, at page 171, states:

> "It is manifest from this regulation that to determine ceiling price in a given situation, one must know (a) the buyer's 'customary receiving point'; (b) the freight charges from Chicago to the buyer's 'customary receiving point'; (c) whether the prosecution is for an alleged violation of the retail ceiling or of the wholesale ceiling; and (d) with respect to those transactions alleged to have been 'f.o.b.', the freight charges from the farm to the buyer's 'customary receiving point.' **This is because the then regulation made no specific price ceiling for the different localities which are set forth in the indictments. The indictments simply set forth a ceiling price. But, in the indictments all the administrative symbols constituting the formula are left as unknowns.**"

Concluding on this point, the Court's language is:

> "In short, I cannot tell from the indictments whether a crime has been committed—even if all the facts alleged are proved at trial. This alone renders the indictments insufficient."

The foregoing cases are peculiarly applicable to the case at bar. Here the regulation purporting to fix maximum rentals merely sets forth various means for computing such maximum rentals.

The mere allegation that the maximum rental was two dollars per night for two persons is but the conclusion of the pleader. Neither Court nor counsel can determine from the statute, the regulations and the information, whether two dollars per night or five

dollars per night was above, below or exactly equal to the maximum price established by law. In fact, neither the statute nor the regulations establish any maximum rental, all they do is to provide various methods of computation, to be used under varying conditions, for establishing such rental.

In erroneously upholding the sufficiency of the information the lower Court's first decision states (R. 17):

> "Under Sec. 11 of said rent regulation the maximum rent to be charged for any room, regularly rented in any defense rental area, must be filed in the Area Rental Office. Once the maximum rent has been so filed it cannot be changed except by a formal order by the Area Rent Director pursuant to Sec. 5 of the said regulation. Therefore the maximum rent of the room in question, $2.00, was determined and certain under Sec. 7 of the regulation noted and so alleged in the information."

The most superficial reading of the information demonstrates that the foregoing statement is incorrect. The information does not allege that the room was one "regularly rented"; neither does it allege that there was ever filed in the area rental office the maximum rent to be charged, or that the Director ever made a formal or other order changing the rent.

The lower Court failed to consider that **neither that Court nor the trial Court could take judicial notice of a mere schedule or declaration filed by a civilian with the OPA.**

Next the original decision upholds the information by the following reasoning:

> "The case upon which appellant relies, *United States v. Johnson*, 53 F. Supp. 167, can be distinguished on the ground that there were there involved commodities with variable maximum prices, determined, in each instance and at each time, by the application of a formula involving many variable factors. That is not the situation here." (R. 17.)

Of course, the Regulations promulgated by the Administrator for the fixing of maximum rents are just as variable as were the Regulations fixing the different maximum prices for the commodities involved in the *Johnson* case. The same situation exists in the case at bar as existed in the *Johnson* case and in the *Ferrant* case, supra.

Lastly, the original decision concludes as follows:

> "If more information was required to enable defendant to adequately prepare a defense (no demand was made for a bill of particulars) it could have been had upon motion by appellant." (R. 17.)

Again the lower Court has overlooked a material rule, viz: that deficiencies in an indictment or information cannot be cured by the furnishing of a bill of particulars. (*Foster v. United States*, 253 Fed. 481.)

After a rehearing was granted the Court rendered a second decision (R. 20) reading as follows:

"Upon consideration of the arguments advanced upon rehearing, we affirm our original opinion in this case. (156 F. 2d 977.)

We are of the view that the information recited sufficient facts to properly charge a crime against the United States and to adequately inform petitioner of what she was charged." (Citing five cases.)

The cases cited at the end of the foregoing decision do not support the conclusion of the Court. We will briefly discuss such cases.

Morgan v. United States, 149 Fed. (2d) 185, involved the sale of ice, a commodity for which the maximum price was definitely fixed by Regulation of which the Court could take judicial notice.

In *United States v. Seiner,* 152 Fed. (2d) 484, the sale involved agricultural implements, the maximum price of which was definitely fixed by a price Regulation judicially noticed by the Court.

Flannagan v. United States, 145 Fed. (2d) 740, involved the sale of beef. The Regulation specifically fixed the price per pound for the sale of a certain grade, and the information alleged that the beef sold was of that grade and a certain weight, and the maximum price fixed by the Regulation.

The case of *United States v. Fried* (CCA-2), 149 Fed. (2d) 1011, requires a bit more discussion.

The Court in the *Fried* case admitted that the information set forth only legal conclusions and then,

pursuant to its own decisions and contrary to the law of other circuits and as announced by the Supreme Court, held that such was a defect in matter of form and not of substance. The Court's language is as follows:

> "Strictly, we need say no more as to the information than that the objection was raised too late; for no essential allegation was omitted, and the defect, if any, was only of insufficiency in form: i.e., **that instead of facts the information alleged only legal conclusions.**" (Emphasis supplied.)

The allegation of a material fact in a pleading merely as a legal conclusion is defect in a matter of substance. (See cases cited above in this brief.)

Then the Court proceeded to discuss the matter and, under rules pertaining to the Second Circuit, held the allegations sufficient:

> "We regard the defect as falling within §556 of Title 18 U.S.C.A., and of no importance unless the accused can show that the information as a whole does not advise him adequately of what he has to meet. Not only in civil, but in criminal, proceedings we demand nothing more than that a party charged shall be told the facts fully enough, and in sufficient season, to enable him to prepare his defense. Inconsistencies between allegation and proof, and inadequacies in allegation, are unimportant unless they result in such prejudice. Our latest decisions upon the point are (here the Court cites three decisions from its own, the second, circuit). In so far as the decisions in *United States v. Johnson,* D. C., 53 F.

> Supp. 167 and *United States v. Ferranti,* D.C. N.J., 59 F. Supp. 1003, are to to the contrary, they do not represent the law of this circuit."

The Court was in error in holding that the defect was one of form only and therefore cured by Sec. 556 aforesaid. The failure to allege a material and essential fact, or alleging such merely as a conclusion, is a defect in matter of substance.

> "Section 1025, Revised Statutes (18 USCA §556), has reference to form only, and cannot be invoked to cure the omission of an essential element of the offense sought to be charged."
>
> *Wishart v. United States* (CCA-8), 29 Fed. (2d) 103, 107;
>
> *Asgill v. United States,* 60 Fed. (2d) 780.

The Court entirely overlooked the fact that the jurisdiction of the Court depended upon the filing of a valid accusatory pleading—one that stated the facts constituting the offense.

CONCLUSION.

It is submitted that the decision of the Circuit Court of Appeals is erroneous in all particulars; that it announces rules in direct conflict with applicable decisions of this Court and those of other Circuit Courts of Appeal; that it misconstrues the Emergency Price Control Act and lays down rules as to the sufficiency of indictments and informations which render such documents useless in giving to

Court or accused any facts from which can be determined whether, in fact a crime against the United States has been committed.

Dated, San Francisco, California,
March 24, 1947.

Respectfully submitted,
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